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SCRAPING SOME MOSS FROM THE OLD OAKEN DOCTRINE: ELECTION BETWEEN UNDISCLOSED PRINCIPALS AND AGENTS AND DISCOVERY OF THEIR NET WORTH

MICHAEL L. RICHMOND*

*How dear to some hearts is the old oaken doctrine
Of the misinformed plaintiff's election to sue
The contracting agent or undisclosed principal
Whom research or fortune presents to full view.¹*

I. INTRODUCTION

The responsibility of undisclosed principals for the contracts of their agents and the vicarious liability of masters for the torts of their servants spring from the same soil. In neither case have analysts propounded a viable legal theory for the doctrine,² yet few would debate the commercial necessity of either.³ In each instance, the roots lie deep in the soil of mercantile practice.

In the nascent stages of a new era of an expanded and increasingly complex business environment, courts developed legal doctrines to mirror commercial reality.⁴ Courts,

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1. Merrill, *Election (Undisclosed Agency) Revisited*, 34 NEB. L. REV. 613, 613 (1955).

2. See *infra* notes 15-29, 34-42 and accompanying text.

3. See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 543-45 (1961); Wright, *Undisclosed Principal in California*, 5 CALIF. L. REV. 183, 184 (1917).

4. An early example is the subsuming of the law merchant by common law courts having a jury of merchants establish mercantile custom, which the courts then applied. "In this way the common law began to capture the field of mercantile affairs,

however, have long acknowledged their ineffectiveness in determining matters of economic theory. For example, the business judgment rule specifically bars courts from reviewing the commercial wisdom of decisions of corporate officials,⁵ although courts may look behind the decisions to discover fraud or self-dealing.⁶ Thus, although the doctrines themselves may provide the necessary legal mechanism for maintaining the free flow of commerce, when they interact with doctrines supported by purely legal reasoning, inconsistencies result. One such inconsistency occurs where a tort plaintiff may recover a judgment against both principal and agent,⁷ but a contract plaintiff must elect against which of the two the court will enter judgment.⁸

Complicating matters further, a plaintiff in a civil action can discover the net worth of a defendant prior to judgment in only the most limited circumstances.⁹ Accordingly, the contract plaintiff must elect between principal and agent with no real knowledge of which has the greater resources and the better ability to pay a judgment. Proceeding simply on the presumption that the principal has the "deeper pocket" often leads a plaintiff to the unpleasant dead end of an unsatisfied judgment while the highly solvent agent goes unchallenged.¹⁰

This article compares the theories of vicarious liability and liability of an undisclosed principal for the contracts of an agent, suggesting that courts have no theoretical basis for

but for a long time it regarded itself as administering a strange and foreign law." T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 663 (5th ed. 1956). See also K. SMITH & D. KEENAN, *ENGLISH LAW* 9-10 (4th ed. 1973); *RESTATEMENT OF AGENCY* (Tent. Draft No. 4, 1929) § 435 explanatory note, cited in *Grinder v. Bryans Rd. Bldg. & Supply Co.*, 290 Md. 687, ___, 432 A.2d 453, 460-61 (1981) [hereinafter cited as § 435 explanatory note].

5. *E.g.*, *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (1968). But see *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981).

6. *E.g.*, *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wash. 2d 375, 391 P.2d 979 (1964).

7. *E.g.*, *Cravens v. Lawrence*, 181 S.C. 165, 186 S.E. 269 (1936).

8. *E.g.*, *National Marine Serv. v. C.J. Thibodeaux & Co.*, 380 F. Supp. 1076 (S.D. Tex. 1973).

9. See *infra* text accompanying notes 178-220.

10. "Moreover, one may question the expediency of a rule which makes just compensation dependent upon the often blind guess of the plaintiff's attorney as to the financial responsibility of the defendants and their susceptibility to service." 36 COLUM. L. REV. 324, 326 (1936).

mandating election in the case of the undisclosed principal but not in the case of vicarious liability. It then considers the various procedural avenues within a lawsuit available to a plaintiff seeking to discover the relative worth of the principal and the agent. Finally, assuming courts will continue to require an election, it suggests the use of discovery to permit a plaintiff to knowingly choose a defendant.

II. VICARIOUS LIABILITY OF MASTERS

From the outset of the contemporary theory of vicarious liability, courts acknowledged its equities. In *Hern v. Nichols*¹¹ Chief Justice Holt held:

that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger: and upon this opinion the plaintiff had a verdict.¹²

Thus, the formation of the doctrine lay in allocating the risk of loss when an agent could not pay for his own torts. As between the principal who employed the agent to do that which the principal might otherwise take upon himself and the third party, the principal would more appropriately bear the loss.¹³ Of course, the principal would then have a right to recover from his agent any loss he had paid the third party, by a direct cause of action for breach of fiduciary duty.¹⁴ So, although the ultimate loss would indeed fall directly on the tortfeasor agent, if he could not pay the loss it would fall on the principal who had employed him rather than on the third party who incurred the injury.

Few would deny the fairness of this approach, yet for the past ninety years authors have debated its theoretical underpinnings. To Oliver Wendell Holmes, the entire concept flew in the face of common sense while retaining a certain

11. 91 Eng. Rep. 256 (K.B. 1709).

12. *Id.*

13. Cf. P. MECHEM, OUTLINES OF THE LAW OF AGENCY § 353, at 240 (4th ed. 1952).

14. *Washington Gaslight Co. v. District of Columbia*, 161 U.S. 316, 327-28 (1896); *Smith v. Foran*, 43 Conn. 244 (1875); *Grand Trunk Ry. v. Latham*, 63 Me. 177 (1874).

logical consistency.¹⁵ While common sense might reject making one person pay for the wrong of another, the logical chain begun by *qui facit per alium, facit per se*¹⁶ progressed inevitably to the conclusion of vicarious liability in tort.¹⁷ Professor Wigmore produced a definitive compilation of those cases forming the historic basis of the rule and concluded that vicarious liability simply presented an instance where we "employ a fiction to sanction a rule which we thoroughly believe in, but lazily prefer to evade accounting for openly and rationally [I]n short, the rule would have stood substantially as it does now, if all reference to the Identification fiction were wanting."¹⁸ Rather like pornography,¹⁹ then, vicarious liability stems from a theory which, although undefinable, is readily recognizable.²⁰

During ensuing years, commentators reached agreement on only one point: that no viable legal theory to support vicarious liability met with their mutual approval.²¹ At the same time, the pragmatic approach seemed irrefutable.²² "No one really desires to attack the private fortunes of associated individuals; but it is eminently desirable that means should be had of getting at the funds they collectively subscribe, when legal—or illegal—results flow from their collective action."²³ Undeniably, the "deep pockets" approach, which law in the grand manner denigrated,²⁴ lay firmly at the root of vicarious liability.

15. Holmes, *Agency* (pt. 2), 5 HARV. L. REV. 1, 14 (1891).

16. "[A]n act within the power of the agent has the same legal effect as if done by the principal." W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* § 56 (1964).

17. Holmes, *supra* note 15, at 14-16.

18. Wigmore, *Responsibility for Tortious Acts: Its History* (pt. 2), 7 HARV. L. REV. 383, 399 (1894).

19. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

20. "It is quite true that we have no sure test of the ethical basis or economic expediency of *respondeat superior*." Seavey, *Speculations as to "Respondeat Superior,"* in *HARVARD LEGAL ESSAYS* 433, 434 (1934).

21. "A number of explanations or justifications for the rule have been offered. . . . None of these reasons is completely satisfying, though many of them contain elements of truth." P. MECHEM, *supra* note 13, §§ 352-353.

22. *Cf. Warax v. Cincinnati, N.O. & T.P. Ry.*, 72 F. 637, 643 (C.C.D. Ky. 1896).

23. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 125-26 (1916).

24. *See* P. MECHEM, *supra* note 13, § 352.

Approaching the midpoint of the current century, the law sought justification for its rules in other disciplines.²⁵ At the forefront of the trend, Guido Calabresi took a new look at vicarious liability and concluded that societal and economic considerations mandated distribution of the risk of loss generated by a particular activity among the widest possible segments of society.²⁶ Should the agent lack the ability to pay, the principal should bear the initial loss directly, or through insurance, redistribute it to his patrons over the succeeding years through increased prices.²⁷ This approach translated as the "deep pockets" theory writ large—society as a whole had the deepest available pockets.²⁸ By searching for the person most readily able to pay, the law had in fact overlooked the obvious: that once it located him, he would simply redistribute the cost among his own clientele.

Thus, whether through the equitable concept that the most appropriate result lay in placing the burden on the one who had instigated the action, or through the pragmatic approach that the most appropriate result lay in placing the burden on the one most able (or likely) to pay, vicarious liability came about as a dominating force in the law. For whatever reason, loss has occurred. The principal of the person creating that loss should bear its burden rather than the unwitting third party.²⁹ Viewed from a slightly different perspective, a person should not avoid liability for an act which might yield him profit simply because a person other than himself undertook that act.

25. Justice William O. Douglas attempted "to furnish an economic and social basis for a rule of vicarious liability" as early as 1929. Douglas, *Vicarious Liability and Administration of Risk II*, 38 YALE L.J. 720, 745 (1929).

26. Calabresi, *supra* note 3.

27. Professor Seavey also acknowledges this approach, believing the master will take greater care in selecting his employees and will obtain liability insurance as a cost of doing business. W. SEAVEY, *supra* note 16, § 83. See also H. REUSCHLEIN & W. GREGORY, *HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP* § 52 (1979).

28. But see P. MECHEM, *supra* note 13, § 360.

29. It is simply on the ground of public policy, which requires that he shall be held responsible for the acts of those whom he employs, done in and about his business, even though such acts are directly in conflict with the orders which he has given them on the subject.

Warax v. Cincinnati, N.O. & T.P. Ry., 72 F. 637, 643 (C.C.D. Ky. 1896).

III. LIABILITY OF UNDISCLOSED PRINCIPALS

Attempts to rationalize the liability of undisclosed principals took a somewhat different tack. Most commentators acknowledged that the basic rule lacked any true justification in the law of contracts. However, they arrived at the same conclusion—although lacking in underlying theory, the rule made sense.

In *Scrimshire v. Alderton*³⁰ a court first permitted an undisclosed principal of a contracting agent to sue the party with whom the agent contracted. The seminal case dealing with the obverse suit, *Edmunds v. Bushell*,³¹ found the undisclosed principal liable in a suit by the third party since "[i]t would be very dangerous to hold that a person who allows an agent to act as a principal in carrying on a business, and invests him with apparent authority to enter into contracts incidental to it, could limit that authority by a secret reservation."³² Later cases agreed, stressing that the general law of agency making the principal liable for all authorized acts of the agent must govern.³³

Undeniably, when viewed in the pure light of the basic law of contracts these decisions make little sense.

The right of one person to sue another on a contract not really made with the person suing is unknown to every other legal system except that of England and America. It rests originally on a sort of common law equity, and originates in the feeling that a principal who had got the advantage of a purchase ought to pay for it if the agent to whom the seller really trusted was not able to do so.³⁴

This statement of Sir Frederick Pollock has echoed in the words of virtually all commentators, both British and Amer-

30. 93 Eng. Rep. 1114 (K.B. 1743).

31. 1 Q.B. 97 (1865).

32. *Id.* at 100 (Mellor, J.).

33. *Watteau v. Fenwick*, 1 Q.B. 346, 348 (1893). A later case, however, refused to extend the doctrine. In *Keighley, Maxsted & Co. v. Durant*, 1901 A.C. 240, the principal authorized its agent to purchase wheat at a certain price. The agent contracted in his own name at a higher price than authorized, and the next day the principal agreed with the agent to honor the bargain. Upon refusal of delivery by the principal and agent, the seller sued the principal for nonperformance. The House of Lords refused to permit the principal to ratify or be bound, holding that "an undisclosed principal must exist at the time of the contract. He cannot be brought into life as a principal after the contract has been made without any recognition of his existence." *Id.* at 251 (Lord James of Hereford). See also 7 A.L.J. PROC. 258 (1929).

34. 11 LAW. Q. REV. 358, 359 (1887).

ican, who have discussed the topic.³⁵ They recognize the "anomaly" of the law, while at the same time applauding its rough equity. Beyond this, however, the history of those writers seeking to find a viable legal theory to support an unchallenged equity has proven a study in futility.

Professor Ames suggested that the problem boiled down to one of procedure—that courts should treat the matter as an equitable attempt to levy on the right of exoneration held by an agent against his principal.³⁶ Professor Mechem, however, dismissed this proposal with one brief sentence in a footnote: "Many practical objections to a remedy purely equitable will, however, at once suggest themselves."³⁷ He suggested instead that:

If a principal sends an agent to buy goods for him and on his account, it is not unreasonable that he should see that they are paid for. Although the seller may consider the agent to be the principal, the actual principal knows better. He can easily protect himself . . . and if he does not, but . . . voluntarily pays the agent without knowing that he has paid the seller, there is no hardship in requiring him to pay again.³⁸

This makes for a good rough justice, admittedly, but provides a painfully weak way of making practice accord with the theory of the law of contracts. Another effort to square the two came from William Draper Lewis,³⁹ who maintained that true liability in contract rested not on the promise made by the contracting party but on the fact that the plaintiff had changed his position on the basis of the defendant's activity.⁴⁰ If correct, Professor Lewis arguably provided a theory

35. W. SEAVEY, *supra* note 16, § 56B; Ames, *Undisclosed Principal—His Rights and Liabilities*, 18 YALE L.J. 443, 443-45 (1909); Ferson, *Undisclosed Principals*, 22 U. CIN. L. REV. 131, 132-34 (1953); Mechem, *The Liability of an Undisclosed Principal*, 23 HARV. L. REV. 513, 515 (1910); Wright, *Undisclosed Principal in California*, 5 CALIF. L. REV. 183 (1917). *But see* Lewis, *The Liability of the Undisclosed Principal in Contract*, 9 COLUM. L. REV. 116 (1909); Muller-Freinfels, *The Undisclosed Principal*, 16 MOD. L. REV. 299 (1953).

36. Ames, *supra* note 35, at 449-53.

37. Mechem, *supra* note 35, at 515 n.2.

38. *Id.* at 530.

39. Lewis, *supra* note 35.

40. *Id.* at 133. Even while attempting to find a rational basis in legal doctrine for the rule, Professor Lewis acknowledges that even if undisclosed, the owner of a busi-

of contract compatible with the liability of the undisclosed principal. Unfortunately, his concept worked only in a fraction of cases for breach of contract, for an essential element of a contract is the identity of the contracting parties.⁴¹ While Professor Lewis' theory suffices for cases brought under the equitable theory of promissory estoppel,⁴² it fails utterly under other applications of contract law.

At the same time that theorists found little ability to justify the rule in traditional law, they had to acknowledge its soundness from a business viewpoint. With commendable pragmatism, Austin Tappan Wright⁴³ proposed that commercial reality provided the courts with a perfectly valid justification.

[J]ust as the business man's point of view is the only one that satisfactorily furnished a test whether the relationship of two or more persons is that of partners, so in cases where the rights and liabilities of an undisclosed principal are involved, the test to be applied should be that of the business man's reasonable needs. . . . It will not be the first time that judges have borrowed from the custom of merchants, which is not law, of course, until sanctioned by decision.⁴⁴

Again, loss has occurred. Again, the law has seen fit to allocate the loss as between the principal and the third party to the principal, fully understanding that any ultimate liability would come about only in the absence of the ability of the agent to pay. Commercial necessity dictates the use of middlemen to aid in the formation of contracts, and commercial necessity likewise dictates that the ultimate contracting party assume the liabilities as well as the burdens of the contract.⁴⁵ Otherwise, merchants will not accept the risk

ness must remain liable on its contracts. *Id.* at 125-26. "The rule itself rests on necessity." *Id.* at 129.

41. "In fact the rule by which [the undisclosed principal] is made a party does violence to a basic contract principle by which the personality of the parties is a term of the agreement." W. SEAVEY, *supra* note 16, § 56B. See also 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 286, at 347 (3d ed. 1959).

42. See, e.g., *Hessler, Inc. v. Farrell*, 226 A.2d 708 (Del. 1967); *United Elec. Corp. v. All Serv. Elec., Inc.*, 256 N.W.2d 92 (Minn. 1977).

43. Wright, *supra* note 35.

44. *Id.* at 184.

45. Lord Denning phrases his justification for the entitlement of an undisclosed principal to sue the third party in these terms:

I mean the principle that a man who makes a deliberate promise which is

of looking exclusively to a middleman whose ability to pay presumptively falls short of that of his principal's.⁴⁶

To illustrate the propriety of treating the principal's liability identically in contract and tort, consider the following situation. The owner of a hotel, desiring to build a small addition, sends his handman to the lumberyard to purchase lumber. The handyman, a regular employee of the owner and a person who would under any definition be termed a servant, contracts in his own name for a substantial quantity of lumber which the yard will deliver as his own. In leaving the yard in his own car, the handyman negligently damages a truck belonging to the lumberyard. In neither instance did the lumberyard have any indication that the acts of the handyman were for any individual other than himself, in neither instance did the lumberyard have a "choice" of parties, yet in each instance the owner would incur the liability for the acts of the handyman. In commerce, whether one bears a loss in contract or in tort, one should have the opportunity of looking beyond appearances to reach the individual whose acts occasioned the circumstances from which the loss came.

Essentially, the principle underlying vicarious liability equates with that underlying liability of an undisclosed principal. Although in neither case does the law provide a valid theoretical basis for the rule, in both, the exigencies of commerce and the dictates of an abstract sense of justice demand the result. The question, therefore, comes neither from the jurisprudence of tort nor of contract; it lies firmly fixed in that peculiar amalgam of law, equity and mercantile custom which comprises the unique field of the law of agency.⁴⁷ Ac-

intended to be binding . . . must keep his promise; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was for his benefit and that he has a sufficient interest to entitle him to enforce it . . .

Smith & Snipes Hall Farm Ltd. v. River Douglas Catchment Bd., [1949] 1 K.B. 500, 514. Conversely, the need for the third party to sue the principal also stems from the same commercial necessity.

46. "It should be remembered that the contract was made for the benefit of the principal. The agent must hold what he got in trust for the principal. A seller loses to that extent the credit he relied on." Ferson, *supra* note 35, at 136.

47. "This result could not have been achieved unless the judges had decided in harmony with the general principles underlying our jurisprudence and in response to

cordingly, as the liability of a principal in tort seeks to foster the same end as the liability of a principal in contract, the judicial system has no justification in adopting different procedures to deal with each.

IV. ELECTION BETWEEN MASTER AND SERVANT

Just as the right to sue the undisclosed principal and his agent stems from only one contract, so the right to sue the master and his servant stems from only one tort.⁴⁸ Even in those areas where a plaintiff could sue the principal directly for the alleged tort of the principal—negligent hiring,⁴⁹ ultrahazardous enterprise,⁵⁰ nondelegable duty⁵¹ and the like⁵²—the principal paid for the tort which the agent had in fact committed.⁵³ These cases stemmed from the difficulty with imposing direct liability for the torts of others in many instances and represented an effort by courts to construct alternative avenues of reaching the principal when traditional

commercial necessity." Seavey, *The Rationale of Agency*, 29 YALE L.J. 859, 859 (1920), reprinted in W. SEAVEY, *STUDIES IN AGENCY* 65 (1949).

48. "[I]n reality the master is not a tort-feasor at all; . . . the law identifies the master with the servant for this purpose, and makes the servant's act the master's . . ." Raymond v. Capobianco, 107 Vt. 295, 302, 178 A. 896, 899 (1935) (citing McNamara v. Chapman, 81 N.H. 169, 123 A. 229 (1923)).

49. *E.g.*, Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980); Riddle v. Aero Mayflower Transit Co., 73 So. 2d 71 (Fla. 1954).

50. *E.g.*, Putnam Lumber Co. v. Berry, 146 Fla. 595, 2 So. 2d 133 (1941); Ross v. Heitner, 156 So. 2d 869 (Fla. Dist. Ct. App. 1963).

51. Nondelegable duty may be created by contract, as in Mills v. Krauss, 114 So. 2d 817 (Fla. Dist. Ct. App. 1959), or by statute, as in Mastrandrea v. J. Mann, Inc., 128 So. 2d 146 (Fla. Dist. Ct. App. 1961).

52. Other examples include accidents caused by the principal's own negligent directions to the agent, City of Mount Dora v. Voorhees, 115 So. 2d 586 (Fla. Dist. Ct. App. 1959); accidents occurring due to hazardous conditions which the principal knew would be created by the agent's activity, Maule Indus. v. Messana, 62 So. 2d 737 (Fla. 1953); Peairs v. Florida Publishing Co., 132 So. 2d 561 (Fla. Dist. Ct. App. 1961); accidents stemming from the activity of an agent who performs a contract which calls for his illegal or tortious activity, National Rating Bureau v. Florida Power Corp., 94 So. 2d 809 (Fla. 1956); and incidents following retention of an agent by a principal who knew of the agent's dangerous propensities, Mallory v. O'Neil, 69 So. 2d 313 (Fla. 1954).

53. Of course, the principal would later have a cause of action against the agent whose act occasioned the harm to the third party. Although not a true indemnification claim, it would seem proper to raise it as a third-party cause of action as well. Stulginski v. Cizauskas, 125 Conn. 293, 5 A.2d 10, 12 (1939). *Cf.* W. SEAVEY, *supra* note 16, § 155C; H. REUSCHLEIN & W. GREGORY, *supra* note 27, § 72.

theory failed.⁵⁴ Thus, whether through pure vicarious liability or through direct imposition of liability in the case of an independent contractor or an act of a servant outside of the scope of employment, the law of agency sought to provide two or more sources to satisfy the demands of a tort claimant.

Clearly, a principal and his agent can in no sense of the term be considered joint tortfeasors.⁵⁵ This concept is predicated on the existence of two or more actors, each performing an independent tortious act.⁵⁶ The combination of the acts results in adverse consequences to the plaintiff.⁵⁷ Rather than have the plaintiff hazard the convoluted maze of foreseeability, the law permits the plaintiff to recover against joint tortfeasors both jointly and severally,⁵⁸ leaving the defendants to allocate loss among themselves through such devices as contribution⁵⁹ and indemnification.⁶⁰

Nonetheless, courts overwhelmingly permit a plaintiff to sue both a master and servant jointly in tort, recovering a judgment against both.⁶¹ Indeed, they hold that a judgment against one, so long as it remains unsatisfied, will not bar a judgment against the other.⁶² In reaching this result, courts acknowledge that it flies in the face of traditional tort the-

54. Professor Mechem regards these "exceptions" more as the "disappearing immunity of the employer of an independent contractor." P. MECHEM, *supra* note 13, §§ 480-498.

55. *Stulginski v. Cizauskas*, 125 Conn. 293, 295, 5 A.2d 10, 12 (1939).

56. *See Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948); *Arnst v. Estes*, 136 Me. 272, 8 A.2d 201 (1939).

57. *Id.* *See also Sadler v. Great Western Ry.* [1896] A.C. 450.

58. This joint and several liability continues in vitality even when states have adopted comparative negligence. *American Motorcycle Ass'n v. Superior Ct.*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); *Christians v. Homestake Enterprises, Ltd.*, 97 Wis. 2d 638, 648, 294 N.W.2d 534, 539 (Ct. App. 1980), *rev'd on other grounds*, 101 Wis. 2d 25, 303 N.W.2d 608 (1981) (citing *Chart v. General Motors Corp.*, 80 Wis. 2d 91, 258 N.W.2d 680 (1977)).

59. *See, e.g., Yellow Cab Co. v. Dreslin*, 181 F.2d 626 (D.C. Cir. 1950).

60. *See, e.g., Heit v. Bixby*, 276 F. Supp. 217 (E.D. Mo. 1967). *But see Panasuk v. Seaton*, 277 F. Supp. 979 (D. Mont. 1968).

61. *See P. MECHEM, supra* note 13, §§ 404-406 and cases cited therein.

62. *Brennan v. Huber*, 112 Pa. Super. 299, 171 A. 122 (1934). The same certainly holds true for genuine joint tortfeasors. *See Verhoeks v. Gillivan*, 244 Mich. 367, 221 N.W. 287 (1928).

ory.⁶³ They readily recognize they cannot justify awarding a judgment jointly against master and servant on the basis that the two are joint tortfeasors.⁶⁴ However, they reach this result based on justice and good conscience.⁶⁵

Vermont, which first barred joint recovery and later reversed itself, provides an ideal opportunity to review the two positions. In *Raymond v. Capobianco*⁶⁶ the plaintiff had earlier recovered a judgment against the driver of a truck which had injured him and then, having failed to obtain satisfaction from the driver, sought a second judgment against the owner. The Vermont Supreme Court sustained the judgment of the trial court in favor of the owner.⁶⁷ Recognizing that the issue of election remained unsettled, with some jurisdictions holding a plaintiff could not sue both principal and agent and others holding that he could, the court held:

We are unable to perceive how any of the principles under which joint tort-feasors are held to be jointly and severally liable to an injured party are applicable to a master and servant : . . .

The master is not a wrongdoer, but the law gives to the injured party the right to elect to treat the master and ser-

63. *But see* Moss v. Jones, 93 N.J. Super. 179, 225 A.2d 369 (1966) (court seems to find some justification for the rule).

64. "It is to be observed at the outset that in reality the master is not a tort-feasor at all. He is not a wrongdoer." McNamara v. Chapman, 81 N.H. 169, ___, 123 A. 229, 230 (1923). Justice Peaslee's opinion merits note for the unique way it reaches this conclusion. At the time, New Hampshire prohibited joint tortfeasors from seeking contribution or indemnity. However, masters had the right to either one from their tortfeasor servants. Accordingly, reasoned Justice Peaslee, one essential attribute of a joint tortfeasor was the inability to seek contribution or indemnity, and since a master did not possess this attribute, he could not possibly be a joint tortfeasor.

65. Courts may speak of an "identity" of the principal and agent. McNamara v. Chapman, 81 N.H. 169, ___, 123 A. 229, 231 (1923); Cravens v. Laurence, 181 S.C. 165, ___, 186 S.E. 269, 271-72 (1936). This is the fiction which Professor Wigmore criticized (*see supra* text accompanying note 18) and which marks the general sense of equity acknowledged by Judge Taft in *Warax v. Cincinnati, N.O. & T.P. Ry.*, 72 F. 637, 643 (1896). Some states still require an election even in the case of master and servant. *See* McNamara v. Chapman, 81 N.H. 169, 123 A. 229 (1923); Shaver v. Shircks Motor Express, 163 Ohio St. 484, 127 N.E.2d 355 (1955).

66. 107 Vt. 295, 178 A. 896 (1935).

67. The first plea raised a theory of identity of parties—that the plaintiff could not sue the owner as he had a valid judgment from the prior suit against the driver, who was identical to the owner. (*Cf. supra* note 65). The second urged estoppel based on the prior judgment. The third plea proved the critical one—that in attaining a judgment against the driver the plaintiff made a binding election barring him from later suing the owner/principal. *Raymond*, 107 Vt. at 296-97, 178 A. at 896-97.

vant as one and recover from the master, or to disregard their relation and recover from the servant.⁶⁸

The case brought heated criticism from two leading law journals. Analogizing to the doctrine of election in contracts cases, the *Columbia Law Review*⁶⁹ pointed out that, as commentators universally condemned its application there, it has even less applicability in tort cases where the same act gives rise to both causes of action.⁷⁰ The *Yale Law Journal*⁷¹ pointed out that not only was the theory of the case called into question,⁷² but from a practical viewpoint joinder would avoid a needless duplicity of actions.⁷³ Since essentially the same issues come to play in the trial of the master as well as in that of the servant, consolidation of the two would save valuable court time. Above all, the author of the article reasoned, to force an election "in many instances may well defeat the demands of justice."⁷⁴

Twenty-one years after *Raymond*, Vermont reconsidered its stance in *Daniels v. Parker*.⁷⁵ Pointing to the criticism of *Raymond*,⁷⁶ the court analyzed its earlier position, at first finding the precedents it had used to be of little weight.⁷⁷ Even here, the court's rejection of its earlier decision rested not so much on legal theory as on legal pragmatism. "When one asks the broad, ultimate question, what does the old rule contribute to the administration of justice which justifies its retention, no good reason is apparent."⁷⁸ This same criticism, based on equity and common justice, formed a significant basis of the comment in the *Columbia Law Review*.⁷⁹

68. *Raymond*, 107 Vt. at 303, 178 A. at 899.

69. 36 COLUM. L. REV. 324 (1936).

70. *Id.* at 325-26.

71. Note, *Unsatisfied Judgments Against Servants as Bars to Subsequent Actions Against Non-Negligent Masters*, 45 YALE L.J. 920 (1936).

72. *Id.* at 921-24.

73. *Id.* at 926.

74. *Id.*

75. 119 Vt. 348, 126 A.2d 85 (1956).

76. *Id.* at 351, 126 A.2d at 87.

77. In particular, the court assailed *Parsons v. Winchell*, 59 Mass. (5 Cush.) 592 (1850), as later overruled by statute and, in any event, "[e]ven at the time it was decided . . . not to have been supportable by reason or authority." *Daniels*, 119 Vt. at 352, 126 A.2d at 87.

78. *Daniels*, 119 Vt. at 353, 126 A.2d at 88.

79. See *supra* note 10.

The reliance on common sense rather than on established legal theory stems in large part from an effort to make suits based on vicarious liability fit into the pigeonholes dictated by the law of torts. As indicated earlier,⁸⁰ these pigeonholes are round and the pegs, or procedure, are square, being dictated by the law of agency. The more pragmatic agency doctrine readily acknowledges the necessity of suing both master and servant in one action and of giving the plaintiff the opportunity to satisfy a judgment against either.⁸¹ Vicarious liability, created by the courts to give plaintiffs access to alternative sources of recompense without regard to individual "fault," readily permits a judgment against both a master and a servant and a satisfaction from either.⁸² The master has his remedy in a suit against the servant for breach of fiduciary duty just as a joint tortfeasor has his remedy in contribution.⁸³

V. ELECTION BETWEEN AGENT AND UNDISCLOSED PRINCIPAL

A. *The Theory*

When considering actions in contract against agents and their undisclosed principals, however, courts have reached a result opposite to that in tort actions. Most courts prefer to require the plaintiff to elect which of the two defendants will shoulder the burden of paying the judgment, rather than permitting joint and several liability.⁸⁴ While courts requiring election do so either after verdict but before judgment,⁸⁵ only upon motion by one of the defendants,⁸⁶ or at any time a plaintiff has made a knowing decision to proceed against one of the parties to the exclusion of the other,⁸⁷ only a mi-

80. See *supra* text accompanying notes 43-47.

81. Cf. *Melichar v. Frank*, 78 S.D. 58, ___, 98 N.W.2d 345, 347 (1959).

82. *Moss v. Jones*, 93 N.J. Super. 179, 225 A.2d 369 (1966).

83. See *supra* notes 53-54.

84. *Hohaus v. Schor*, 101 So. 2d 169, 170 (Fla. Dist. Ct. App. 1958); *Joseph Melnick Bldg. & Loan Ass'n v. Melnick*, 361 Pa. 328, 334, 64 A.2d 773, 776 (1949); P. MECHEM, *supra* note 13, § 158.

85. See, e.g., *Capitol Hardware Mfg. v. Naponiello*, 345 Ill. App. 272, 102 N.E.2d 685 (1951).

86. See, e.g., *Conner v. Steel, Inc.*, 28 Colo. App. 1, 470 P.2d 71 (1970).

87. See, e.g., *Hatley Mfg. v. Smith*, 154 Miss. 846, 123 So. 887 (1929).

nority of courts refuse to require the plaintiff to make such a choice.⁸⁸

Courts frequently cite two early California opinions in adopting one form or another of the election requirement: *Ewing v. Hayward*⁸⁹ and *Klinger v. Modesto Fruit Co.*⁹⁰ In those two cases the California court held liability between agent and undisclosed principal to be alternative.⁹¹ The only two theories supporting joint and several liability — duality of contract and joint obligation — both failed in the situation of the undisclosed principal. The plaintiff entered into only one contractual relationship and, accordingly, “cannot make two contracts out of the one contract by seeking to hold each of those two persons [principal and agent] liable severally as an independent obligor.”⁹² Similarly, only one person signed the contract, either in his own name or in a representative capacity. Since the principal was undisclosed, the plaintiff never knew of the representative capacity of the signatory “and though he may elect to hold either one of the two liable as the obligor under the contract, he may not hold [both principal and agent] jointly liable, for to do so would be to give him two obligors where he contracted with, and for the liability of, but one.”⁹³ Other courts felt an election stemmed from the nature of the cause of action rather than the contract: “The cause of action was single and could not be the basis of two distinct judgments.”⁹⁴ These two theories may perhaps be in accord if we view the suit against both parties as a suit for joint liability, while the actual proof simply demonstrates several liability on a single contract.⁹⁵

Some courts held that the procedural barriers raised by a joint suit mandated election. They rejected joint suits

88. See, e.g., *Garbark v. Newman*, 155 Neb. 188, 51 N.W.2d 315 (1952).

89. 50 Cal. App. 708, ___, 195 P. 970, 974 (1920) (Finlayson, P.J., concurring).

90. 107 Cal. App. 97, 290 P. 127 (1930).

91. *Ewing v. Hayward*, 50 Cal. App. at ___, 195 P. at 974. See also *Dornfield v. Thompson*, 177 Wis. 4, 7, 187 N.W. 683, 684 (1922).

92. *Ewing v. Hayward*, 50 Cal. App. at ___, 195 P. at 974.

93. *Id.*

94. *Coles v. McKenna*, 80 N.J.L. 48, ___, 76 A. 344, 345-46 (1910) (citing *Kendall v. Hamilton*, 4 App. Cas. 504 (H.L. 1879)). See also § 435 explanatory note, *supra* note 4, at 35 (“The two causes of action are not inconsistent, since the agent is liable because he made the contract, while the principal is liable because he caused it to be made.”).

95. This rationale was one basis of *Goodale v. Page*, 92 S.C. 413, 75 S.E. 700 (1912).

against defendants because neither defendant could raise an individual counterclaim against the plaintiff.⁹⁶ Alternatively, the election to hold one party liable automatically discharged the liability of the other, providing him with an absolute defense.⁹⁷ However they phrased their rationale, these cases looked to earlier English cases for their justification, most notably to *Kendall v. Hamilton*.⁹⁸ In that case the justices felt that a manifest injustice would ensue if the plaintiff had two causes of action "when it was never the intention of any of the parties that he should do so."⁹⁹ However, as Professor Mechem noted, while *Kendall* reached its result based on the theory of merger of a cause of action into a prior judgment,¹⁰⁰ the American cases rejected the merger thesis in all other regards.¹⁰¹ Thus, it would seem that the theoretical underpinnings of those cases requiring election stand in unstable soil.

Commentators have questioned the application of the doctrine of election (or merger) to the undisclosed principal setting from its very inception. *Kendall* itself came about despite a strong dissent from Lord Penzance:

What justice, then, is there in saying that when three persons are, all and each, individually liable to pay a debt, an action and judgment (still unsatisfied) against two of them should extinguish the liability of the third?

. . . .

[This Court] strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct,

96. *Id.* at ___, 75 S.E. at 701.

97. *Pennsylvania Casualty v. Washington Portland Cement*, 63 Wash. 689, ___, 116 P. 284, 285-86 (1911).

98. 4 App. Cas. 504 (H.L. 1879).

99. *Id.* at 514 (Lord Cairns). Lord Hatherley agreed, feeling those entering a contract have "a right to have the whole matter settled at once." *Id.* at 522. Lord Selborne favored a holding based on *res judicata*. *Id.* at 540. The most pragmatic opinion, that of Lord Blackburn, stated that:

"The Plaintiffs [who had earlier obtained judgment against an insolvent partner/agent] got a right by operation of law, without any merits of their own, by what, as far as regards them, was pure good luck If the Plaintiffs were willing to take advantage of their good luck against the Defendant, it seems no hardship that he should take advantage of their bad luck against them."

Id. at 544.

100. P. MECHEM, *supra* note 13, §§ 156-157.

101. *Id.* § 158.

and even extinguish, legal rights, and is thus made to govern where it ought to subserve.¹⁰²

In the United States the argument came to a head with the adoption of the *Restatement of Agency*.¹⁰³ Prior to the deliberations which led to the promulgation of the *Restatement*, at least one commentator had considered the topic,¹⁰⁴ feeling it at best constituted a rule of procedure rather than a true election¹⁰⁵ — an exhaustion of a cause of action rather than a conscious determination to forego a right to sue.¹⁰⁶ Later discussion would take a far more critical position.

The American Law Institute adopted the view of the majority of American cases, holding that a plaintiff who recovered a judgment against a principal or his agent could no longer proceed against the other.¹⁰⁷ In so doing, however, it went against the belief of its drafters that the better rule favored doing away with the election doctrine in this instance.¹⁰⁸ Believing that American decisions which had earlier abandoned the English doctrine of merger now reverted to it in this one isolated instance,¹⁰⁹ Warren Seavey

102. *Kendall*, 4 App. Cas. at 524-25 (Lord Penzance).

103. As ultimately promulgated, RESTATEMENT OF AGENCY § 210(1) (1933) read: "An undisclosed principal is discharged from liability upon a contract if, with knowledge of the identity of the principal, the other party recovers judgment against the agent who made the contract." This has been preserved intact in RESTATEMENT (SECOND) OF AGENCY § 210(1) (1957). Corresponding sections dealing with release of liability of an agent by election to take judgment against the undisclosed principal are RESTATEMENT OF AGENCY § 337 (1933) and RESTATEMENT (SECOND) OF AGENCY § 337 (1957).

104. Clayton, *Election Between the Liability of an Agent and of His Undisclosed Principal*, 3 TEX. L. REV. 384 (1925). But see Holloway, *Undisclosed Principal—Election*, 98 CENT. L.J. 280 (1925).

105. See Clayton, *supra* note 104, at 408-09.

106. I say *electing* advisedly; for election being a mental condition, [the third party] forms a mental determination to take judgment against the one and not the other; and having taken such judgment, he is forever barred from afterwards pursuing the other, not because he *elects* not to pursue him, but because, in pursuance of that election, he took a judgment which exhausted his cause of action, and it no longer exists.

Id. at 410-11 (emphasis in original).

107. See *supra* note 103.

108. 7 A.L.I. PROC. 256 (1929) (Comments of W. Seavey); § 435 explanatory note, *supra* note 4.

109. See *supra* text accompanying notes 104-105; § 435 explanatory note, *supra* note 4.

criticized the majority rule, saying: "We do not think that is a sound theory, sound common sense or good justice."¹¹⁰ Nonetheless, the Institute, feeling that it did not wish to have the *Restatement* depart from established law, determined to adopt the rule of the majority of the cases and "not be too bold."¹¹¹

Professor Seavey's comments found another voice in an extensive article by Maurice Merrill, compiling all cases in the area and severely criticizing the action of the Institute in adopting the election rule.¹¹² Professor Merrill at first questioned the determination of the Institute that the majority of courts did in fact adhere to election.¹¹³ More to the point, he dissected and destroyed with great gusto each of the arguments propounded in support of the rule. Pursuit of both agent and principal did not lead to inconsistencies for, as with an action in tort,¹¹⁴ the basis for suit differed for each.¹¹⁵ The remaining arguments held little weight when balanced against the basic purpose of liability of the undisclosed principal, that is, "assurance to the third person of the economic

110. 7 A.L.I. PROC. 256, 257 (1929).

111. *Id.* The reporter's notes accompanying the readoption of § 210 in the second *Restatement* indicate a continued reluctance to break with precedent despite a feeling that the rule was unfair. RESTATEMENT (SECOND) OF AGENCY § 210 reporter's note (1957). Considering the recent decision by the Institute to depart from precedent, e.g., RESTATEMENT (SECOND) OF TORTS § 402A (1965), such past timidity deserves reexamination, if not criticism. Indeed, Professor Seavey himself is reported to have strongly opposed the decision to have the *Restatements* reflect only existing law, even where that law represents an unjust rule. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 761 (tent. ed. 1958). See generally *id.* at 757-71.

112. Merrill, *Election Between Agent and Undisclosed Principal: Shall We Follow the Restatement?*, 12 NEB. L. BULL. 100 (1933).

113. "Five to four decisions may be eminently proper in the Supreme Court of the United States with a membership of nine but it hardly seems permissible to regard a five to four count as sufficient to bind forty-eight American jurisdictions to a particular rule. . . ." *Id.* at 117. See also *Johnson & Higgins v. Charles F. Garrigues Co.*, 30 F.2d 251, 254 (2d Cir. 1929) (Hand, J., dissenting). However, given those states which (as Professor Merrill noted) had dicta supporting the rule, and those adopting the view of the first *Restatement*, by the time of the adoption of the second *Restatement* the rule favoring election clearly held sway in the majority of American jurisdictions. See RESTATEMENT (SECOND) OF AGENCY § 210 reporter's note (1957).

114. See *supra* text accompanying notes 55-60.

115. One sues the agent based on the contract and the principal based on operation of law. Merrill, *supra* note 112, at 118-22.

advantage for which he bargained."¹¹⁶ Thus, the argument that since the law gives the plaintiff a windfall, it can later remove it by requiring an election¹¹⁷ totally failed to consider the economic rights of the injured third party.¹¹⁸ Using the doctrine of election to serve the same purpose as *res judicata*¹¹⁹ far overstepped what courts needed to do in order to cure the evil.¹²⁰ Finally, perhaps the strongest argument put forth in *Kendall*, that without election the plaintiff would have two judgments coexisting at the same time,¹²¹ simply placed the rights of the defendant before those of the plaintiff. The balance, given the purpose for liability of the undisclosed principal, should tilt the scales in favor of the plaintiff instead.¹²²

In the years between the *Restatements*, judges¹²³ and commentators¹²⁴ continued to voice their disapproval of the rule. Finally, in a whimsical piece,¹²⁵ Professor Merrill reviewed the progress of the rule since the first *Restatement*, discerning a trend away from the rule of election, and calling on the *Restatement* "[t]o abandon election, that height of nonsense."¹²⁶ The trend, however, would not materialize despite some courts moving away from the election rule and one state — New York — abrogating the rule by statute.¹²⁷

116. *Id.* at 126. The term "advantage" refers to the economic expectations created by the contractual right held by the third party. It does not allude to the liability of the agent or any nonexistent expectation against the undisclosed principal.

117. *See supra* note 99 (Lord Blackburn).

118. Merrill, *supra* note 112, at 126.

119. *See, e.g.,* Murphy v. Hutchinson, 93 Miss. 643, 48 So. 178 (1909).

120. It "is like using a piledriver to crack a papershell pecan, and has about as undesirable consequences." Merrill, *supra* note 112, at 128.

121. *Kendall v. Hamilton*, 4 App. Cas. 504, 515 (H.L. 1879) (Lord Cairns).

122. Merrill, *supra* note 112, at 129. As noted earlier, courts have little trouble arriving at this result in cases brought in tort. *See supra* text accompanying notes 61-65.

123. "This harsh doctrine, resting at most on a rather barren logic, appears to be giving way to the more equitable view that, in the absence of some estoppel, there is no election until a judgment is actually satisfied . . ." Oregon S.S. Corp. v. D/S A/S Hassel, 137 F.2d 326, 330 (2d Cir. 1943).

124. Comment, *Undisclosed Principal's Rights and Liabilities: A Test of Election of Remedies*, 39 CALIF. L. REV. 409 (1951). *See generally* Note, *Election of Remedies: A Delusion?*, 38 COLUM. L. REV. 292 (1938).

125. Merrill, *supra* note 1. This article, while copiously footnoted, is entirely in verse and the reader can actually sing it to the tune of "The Old Oaken Bucket."

126. *Id.* at 617.

127. N.Y. Civ. Prac. Act § 112-B (1939) (expressly enacted to overturn *Georgi v.*

The refusal of the drafters of the second *Restatement* to heed Professor Merrill's call for reform¹²⁸ led to a continuation of the jumble of law in the area.

B. What Constitutes Election—Three Views

No matter what position a court takes regarding the event which constitutes election, all courts agree that the plaintiff must at least know he has an option to sue either the agent or the principal before they will require him to make an election.¹²⁹ Thus, where a third party neither knew nor had reason to know of the existence of a principal at the time he took a judgment against an agent, he could later prosecute an action against the principal. The court held he had not made an election.¹³⁰ "Election to sue [the agent] which defendant says bars subsequent suits against it involved a choice, and choice presupposes knowledge of the alternatives and freedom and ability to choose between them. A plaintiff cannot choose between principal and agent if he does not know who is the principal."¹³¹ Indeed, the defendant has the burden of proving that the plaintiff made a knowing election.¹³² One court has even held that in a suit against both principal and agent, a default judgment which ordered the case calendered for trial against one party did not constitute a knowing election.¹³³ Thus, the single hallmark of an election to which all courts refer is that the plain-

Texas Co., 225 N.Y. 410, 122 N.E. 238 (1919)). See N.Y. LAW REV. COMM. REPORT 213-814 (1939). See also H. HART & A. SACKS, *supra* note 111, at 603-06.

128. See RESTATEMENT (SECOND) OF AGENCY §§ 210, 337 (1957).

129. P. MECHEM, *supra* note 13, § 158. See also Clayton, *supra* note 104, at 400-01; RESTATEMENT OF AGENCY § 210(2) (1933); RESTATEMENT (SECOND) OF AGENCY § 210(2) (1957).

130. Pittsburgh Terminal Coal v. Williams, 70 F.2d 65 (3d Cir. 1934). See also Hugener v. Greider's Wooden Shoe, 108 Ill. App. 2d 98, 246 N.E.2d 323 (1969); Steele-Smith Grocery v. Potthast, 109 Iowa 413, 80 N.W. 517 (1899); Gavin v. Durden Coleman Lumber, 229 Mass. 576, 118 N.E. 897 (1918); Eckstein v. Caldwell, 61 R.I. 142, 200 A. 434 (1938).

131. Pittsburgh Terminal Coal v. Williams, 70 F.2d 65, 67 (3d Cir. 1934). An interesting point is that although this court would have applied the doctrine of election had there been a knowing choice, the case it cites as authority for this exception to the doctrine is Beymer v. Bonsall, 79 Pa. 298 (1875), which expressly rejects the doctrine *in toto*.

132. Beacham v. Coe-Mortimer Co., 30 Ga. App. 456, 118 S.E. 441 (1923); Auto-car Sales & Serv. v. Holscher, 11 S.W.2d 1072 (Mo. Ct. App. 1928).

133. North Carolina Lumber v. Spear Motor, 192 N.C. 377, 135 S.E. 115 (1926).

tiff have done so knowingly. However, courts have followed three distinct lines of reasoning in determining when the plaintiff must make, or will be held to have made, an election.

Of those states adhering to the election doctrine, a minority follow its most onerous manifestation, requiring the plaintiff to elect at the earliest possible moment. Typically, these courts prohibit a plaintiff from pursuing an action against the agent and the principal jointly.¹³⁴ In one state, this result is due to a statute,¹³⁵ while in the others, common law itself has developed the rule.¹³⁶ Even in these states, however, courts have avoided finding an election in the absence of a clear indication. Thus, while taking an actual judgment against the agent will preclude a later suit against the principal,¹³⁷ where a broker charged the account of a principal with a transaction but never collected the debt he could later proceed against the agent,¹³⁸ and where the plaintiff entered into a later contract with the principal he could still sue the agent so long as the later contract remained executory.¹³⁹

Despite these ameliorative efforts, requiring an early election runs contrary to the interests of justice. North Carolina based its determination to prohibit joint suits on the conclusion that to do otherwise would be "placing an unnecessary burden upon trial and possibly leading to confu-

134. Cf. Merrill, *supra* note 112, at 104-05.

135. GA. CODE ANN. § 4-305 (1981), as interpreted by *Dinkler Mgmt. Corp. v. Stein*, 115 Ga. App. 586, 155 S.E.2d 442 (1967). However, although *Dinkler* uses the Code as authority for prohibiting joint suits, the Code itself is totally silent on the matter. Georgia decisions predating the Code (enacted in 1933) do, however, bar joint actions. *E.g.*, *Willingham, Wright & Covington v. Glover*, 28 Ga. App. 394, 396, 111 S.E. 206, 208 (1922).

136. Federal: *The Jungshoved*, 290 F. 733 (2d Cir. 1923), *cert. denied sub nom Dampskibs Selsk Dannebrog v. J. Aron & Co.*, 263 U.S. 707 (1923). Massachusetts: *Williams v. Investors Syndicate*, 327 Mass. 124, 97 N.E.2d 395 (1951). Missouri: *Banjo v. Wacker*, 251 S.W. 456 (Mo. Ct. App. 1923); *but see Burckhardt v. General Am. Life Ins. Co.*, 534 S.W.2d 57 (Mo. Ct. App. 1975) (dictum suggesting a joint suit may progress with an election required at some point prior to judgment). North Carolina: *Walston v. R.B. Whitley & Co.*, 226 N.C. 537, 39 S.E.2d 375 (1946). Ohio: *Campbell v. Murdock*, 90 F. Supp. 297 (N.D. Ohio 1950) (dictum) (applying Ohio law but without citing any Ohio cases).

137. *Bovard v. Owen*, 30 S.W.2d 154 (Mo. Ct. App. 1930).

138. *Wieselman v. Anderson*, 43 S.W.2d 905 (Mo. Ct. App. 1931).

139. *Negbaur v. Vogel Const. Co.*, 58 S.W.2d 346 (Mo. Ct. App. 1933).

sion.”¹⁴⁰ However, Professor Merrill criticizes this rationale: “The utter unsoundness of the policy argument is demonstrated by the numerous decisions which allow actions brought against both principal and agent to proceed through trial”¹⁴¹ Further, as this article later discusses,¹⁴² an early election provides the plaintiff with no opportunity, under prevailing law or under an expanded form of discovery, to ascertain which of the potential defendants has greater assets, and which he, accordingly, should elect.

The vast majority of courts follow the *Restatement* view and permit a plaintiff to pursue a cause of action against both principal and agent, requiring, however, that at some point prior to judgment the plaintiff elect against whom he will take judgment.¹⁴³ *Klinger v. Modesto Fruit Co.*¹⁴⁴ justified this approach as follows:

An election before the rendition of judgment might not accord with the court's view of the relationship as disclosed by the evidence. A premature choice might result in an erroneous selection and a total loss of a valid claim

The law will not require a litigant to gamble on his remedy.¹⁴⁵

Even in these jurisdictions, however, the very fact of an election before a litigant has the opportunity to ascertain the relative net worth of the defendants means that, contrary to *Klinger's* express language, the law *does* “require a litigant to gamble on his remedy.” In any event, a plaintiff may wait through the trial stage before having to exercise the election.¹⁴⁶

140. *Walston v. R.B. Whitley & Co.*, 226 N.C. 537, ___, 39 S.E.2d 375, 377 (1946).

141. Merrill, *supra* note 1, at n.17.

142. *See infra* text accompanying notes 243-45.

143. *See supra* note 103.

144. 107 Cal. App. 97, 290 P. 127 (1930).

145. 107 Cal. App. at ___, 290 P. at 129.

146. Florida: *Bertram Yacht Sales v. West*, 209 So. 2d 677 (Fla. Dist. Ct. App. 1968); *Hohaus v. Schor*, 101 So. 2d 169 (Fla. Dist. Ct. App. 1958). Illinois: *Johnson v. Fischer*, 108 Ill. App. 2d 433, 247 N.E.2d 805 (1969); *Capitol Hardware Mfg. v. Naponiello*, 345 Ill. App. 272, 102 N.E.2d 685 (1951). Iowa: *Steele-Smith Grocery Co. v. Potthast*, 109 Iowa 413, 80 N.W. 517 (1899). Kansas: *Homer v. McCormick*, 8 Kan. App. 333, 56 P. 1124 (1899). Louisiana: *LaBella Insulation, Inc. v. Connolly*, 182 So. 2d 117 (La. Ct. App. 1966). Michigan: *Old Ben Coal Co. v. Universal Coal Co.*, 248 Mich. 486, 227 N.W. 794 (1929). Minnesota: *Stevens v. Wisconsin Farm Land Co.*, 124 Minn. 421, 145 N.W. 173 (1914). Mississippi: *Hatley Mfg. Co. v.*

A plaintiff need not take a case through to a final judgment before he will have made an election. Where a defendant cross-claimed against a plaintiff, asserting failure of the plaintiff to deliver a tractor sold by his agent, a later settlement of the claim with the agent would bar prosecution of the cross-claim.¹⁴⁷ Thus, any procedural step which amounts to a final determination that either principal or agent will incur liability acts as an election which will bar suit against the other — an election which courts hold irrevocable.¹⁴⁸

Due perhaps to the finality imposed by the rule of irrevocability, courts have declined to find an election to hold a party liable based only on decisions made in the course of business. In one instance, a party assigned a claim against another "as well as any undisclosed principal or principals whom they represent."¹⁴⁹ The court held that this assignment, even if it amounted to an act seeking to charge the agent with liability, did not constitute such a decisive act as to justify its being an election.¹⁵⁰ Similarly, continuing to deal with the agent even after disclosure of the existence of a principal, will not constitute an election.¹⁵¹ Finally, an undisclosed principal does not escape potential liability simply because a third party claims to look only to the agent for payment even though knowing of the principal's existence.¹⁵²

Smith, 154 Miss. 846, 123 So. 887 (1929). New Jersey: Raymond-Commerce Corp. v. Warner, 16 N.J. Misc. 548, 2 A.2d 878 (1938) (dictum); Coles v. McKenna, 80 N.J.L. 48, 76 A. 344 (1910). Rhode Island: Eckstein v. Caldwell, 61 R.I. 142, 200 A. 434 (1938) (dictum). South Carolina: Goodale v. Page, 92 S.C. 413, 75 S.E. 700 (1912). Tennessee: Hill v. Hill, 34 Tenn. App. 617, 241 S.W.2d 865 (1951). Texas: Owen v. King, 84 S.W.2d 743 (Tex. Civ. App. 1935), *rev'd on other grounds*, 111 S.W.2d 695 (Tex. 1938); Pittsburg Plate Glass Co. v. Roquemore, 88 S.W. 449 (Tex. Civ. App. 1905). Virginia: Harris v. McKay, 138 Va. 448, 122 S.E. 137 (1924) (dictum indicates the court favors this variation). Washington: Pennsylvania Casualty v. Washington Portland Cement, 63 Wash. 689, 116 P. 284 (1911). West Virginia: Pittsburgh Terminal Coal Corp. v. Bennett, 73 F.2d 387 (3d Cir. 1934) (weak dictum applying West Virginia law). Wisconsin: Dornfield v. Thompson, 177 Wis. 4, 187 N.W. 683 (1922).

147. *Klassie v. Holt*, 233 Iowa 826, 10 N.W.2d 540 (1943). *See also* *Love v. St. Joseph Stock Yards*, 51 Utah 305, 169 P. 951 (1917).

148. *See, e.g., Bell v. Borders*, 205 Ky. 181, 265 S.W. 514 (Ct. App. 1924).

149. *Berry v. Chase*, 179 F. 426, 428 (6th Cir. 1910).

150. *Id.* at 429.

151. *Sanger v. Warren*, 40 S.W. 840, 842 (Tex. Civ. App. 1897), *rev'd on other grounds*, 91 Tex. 472, 44 S.W. 477 (1898).

152. *Union Trust Co. v. Rodeman*, 220 Wis. 453, 472, 264 N.W. 508, 515 (1936).

In these cases we continue to see two patterns: the need of courts to adopt rules which interfere as little as possible with the free flow of commerce,¹⁵³ and a continuing reluctance of courts to apply the doctrine of election unless absolutely mandated by the facts.¹⁵⁴

A third view, adopted by a handful of courts, would still require an election prior to judgment, but only upon motion of one of the defendants.¹⁵⁵ Failure to move constitutes a waiver of the right to demand an election, and in the absence of such a motion the plaintiff may have judgment against either or both defendants.¹⁵⁶ This rule has particular appeal in those cases where the purported principal disputes the agency. The motion for election will thus put the issue clearly before the court at the earliest possible moment, and the court can then take it under advisement until the plaintiff has established the agency relationship.¹⁵⁷

In these states as well, an affirmative act of election connected with the litigation must take place before the court will discharge either principal or agent from liability. Simply obtaining the financial statement of an agent will not constitute such an election.¹⁵⁸ Indeed, one bizarre decision held that even though the third party elected to pursue the principal, he could later seek judgment against the agent as well.¹⁵⁹ Although the case deals with a partially disclosed principal, the rationale for holding the agent liable generally is identical to that of holding the agent liable for an undis-

153. See *supra* text accompanying notes 2-6.

154. See P. MECHEM, *supra* note 13, § 159.

155. California: *Klinger v. Modesto Fruit Co.*, 107 Cal. App. 97, 290 P. 127 (1930). Colorado: *Conner v. Steel, Inc.*, 470 P.2d 71 (Colo. App. 1970). Nevada: *Peccole v. Fresno Air Serv.*, 86 Nev. 377, 469 P.2d 397 (1970); *Nesbitt v. Cherry Creek Irrigation Co.*, 38 Nev. 150, 145 P. 929 (1915). New Hampshire: *Hoyt v. Horst*, 105 N.H. 380, 201 A.2d 118 (1964). Utah: *Costello v. Kasteler*, 7 Utah 2d 310, 324 P.2d 772 (1958). "The need to resort to this variation strongly suggests the dissatisfaction of courts with the basic election rule." *Grinder v. Bryans Rd. Bldg. & Supply Co.*, 290 Md. 687, ___, 432 A.2d 453, 464 (1981).

156. *Luce v. Sutton*, 115 Cal. App. 2d 428, 252 P.2d 352 (1953). See also *Hoyt v. Horst*, 105 N.H. 380, 201 A.2d 118 (1964); *Costello v. Kasteler*, 7 Utah 2d 310, 324 P.2d 772 (1958).

157. *McEwen v. Taylor*, 106 Cal. App. 2d 25, 234 P.2d 754 (1951).

158. *Marr v. Postal Union Life Ins. Co.*, 40 Cal. App. 2d 673, 105 P.2d 649 (1940).

159. *Peccole v. Fresno Air Serv.*, 86 Nev. 377, 469 P.2d 397 (1970).

closed principal.¹⁶⁰ Not surprisingly, this case stands by itself. Where the defendants make their pro forma motion for election, the plaintiff can simply elect to pursue the principal, using this precedent to support a later case against the agent. Thus, this case effectively does away with the doctrine of election in any practical manner.

Whether one views election as a procedural or a substantive matter,¹⁶¹ the majority of states require election at some point in the proceedings. While some forms of the doctrine prove less onerous than others, they all require a plaintiff to blindly guess which defendant has the greater ability to pay a judgment. Thus, the entire concept of a "knowing" election falls frustrated by the way.

C. States Rejecting Election

A small but slowly increasing number of states totally reject the concept of election and permit plaintiffs to secure a judgment against both the undisclosed principal and the agent, although obtaining only a single satisfaction.¹⁶² One

160. "Fresno Air elected to proceed against Peccole and Perlman. This election did not destroy the right to recover since an agent is not absolved from liability on a contract which he has made for a partially disclosed principal." *Peccole v. Fresno Air Serv.*, 86 Nev. 377, ___, 469 P.2d 397, 399 (1970). Compare RESTATEMENT (SECOND) OF AGENCY § 321 (1957) with RESTATEMENT (SECOND) OF AGENCY § 322 (1957). Thus, the case will serve as precedent where an undisclosed principal is involved. *But see* Sargent & Rochvarg, *A Reexamination of the Agency Doctrine of Election*, 36 U. MIAMI L. REV. 411 (1982) (advocates different rules of election for undisclosed and partially disclosed principals).

161. Requiring election only on motion may seem to reduce the issue to one of procedure. This article takes no position on whether federal courts sitting in these states need follow state practice or can apply their own rule as one of procedure, pursuant to *Hanna v. Plumer*, 380 U.S. 460 (1965).

162. Arkansas: *Williamson v. O'Dwyer & Ahern Co.*, 127 Ark. 530, 192 S.W. 899 (1917). Kansas: *State Bank of Kingman v. Braly's Estate*, 139 Kan. 788, 33 P.2d 141 (1934) (claim against principal in bankruptcy does not preclude concurrent claim against agent); *but see* *Amortibanc Inv. Co. v. Rampart Associated Mgmt.*, 6 Kan. App. 2d 227, 627 P.2d 389 (1981). Kentucky: *Hoffman v. Anderson*, 112 Ky. 893, 67 S.W. 49 (1902) (claim against agent in bankruptcy does not preclude claim against principal); *but see* *Bell v. Borders*, 205 Ky. 181, 265 S.W. 514 (Ct. App. 1924). Maryland: *Grinder v. Bryans Rd. Bldg. & Supply Co.*, 290 Md. 687, 432 A.2d 453 (1981). Nebraska: *Garbark v. Newman*, 155 Neb. 188, 51 N.W.2d 315 (1952); *Lincoln Joint Stock Land Bank v. Bexten*, 125 Neb. 310, 250 N.W. 84 (1933). Pennsylvania: *Joseph Melnick Bldg. & Loan Ass'n v. Melnick*, 361 Pa. 328, 64 A.2d 773 (1949); *Beymer v. Bonsall*, 79 Pa. 298 (1875). New York reached this result through legislation. N.Y. CIV. PRAC. ACT § 112-B (1939).

early case eschewed doctrinal considerations, couching its decision in procedural terms. In Arkansas the supreme court affirmed a judgment against a principal and an agent jointly.¹⁶³

[A]s both the undisclosed principal and the agent are liable for a debt incurred by the agent within the scope of his authority, it is unimportant to inquire whether or not there is any such joint liability as authorizes a suit against them jointly, for the reason that the two actions, if brought separately, could properly be consolidated . . .¹⁶⁴

More typically, however, courts addressed the substance of the problem. The seminal case, *Beymer v. Bonsall*,¹⁶⁵ ironically came as a per curiam decision from the Pennsylvania Supreme Court. The court adopted a sweeping view of contractual liability, holding that once one incurs liability under a contract he can absolve it only through an actual satisfaction, not through the intermediate step of a judgment.¹⁶⁶ Accordingly, as both the principal and agent have liability on the contract made by the agent, neither can avoid liability until the creditor has satisfied his claim. From this, it naturally follows that a creditor may obtain a judgment against either.¹⁶⁷ However, as the liability thus becomes joint and several,¹⁶⁸ a release or other satisfaction gained from either the principal or agent will discharge the other to the extent of the payment made.¹⁶⁹

After a welter of early cases in lower courts yielding conflicting precedent,¹⁷⁰ the New York Court of Appeals de-

163. *Williamson v. O'Dwyer & Ahern Co.*, 127 Ark. 530, 192 S.W. 899 (1917). The court also broke with tradition in that case by holding a husband could serve as his wife's agent.

164. *Id.* at ___, 192 S.W. at 899.

165. 79 Pa. 298 (1875).

166. *But see* E. FARNSWORTH, *CONTRACTS* § 12.2 (1982): "The principal legal remedy to enforce a promise is a judgment awarding a sum of money." *See also* D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 1.3 (1973): "The law of remedies is only indirectly concerned with devices used to enforce remedies once they have been denied." The Pennsylvania view, although undeniably practical, does not follow the purer practice of separating a judgment from remedies used to collect it.

167. 79 Pa. at 300.

168. *Joseph Melnick Bldg. & Loan Ass'n v. Melnick*, 361 Pa. 328, ___, 64 A.2d 773, 777 (1949).

169. *Id.*

170. "The doctrine of election in its general application, is unsuitable and harsh, and it should not be applied to an action brought upon a contract made by an agent

cided to adopt the doctrine of election in *Georgi v. Texas Co.*¹⁷¹ In succeeding years the negative comments directed toward *Georgi* led to the passage of legislation specifically aimed at avoiding its result,¹⁷² and, thus, New York by statute rejected the doctrine of election.¹⁷³

Maryland, the most recent addition to the list of states rejecting the doctrine of election, did so in the most thorough manner. In *Grinder v. Bryans Road Building & Supply Co.*¹⁷⁴ the court narrowly examined many reasons other courts gave for the doctrine and, using its own logic and liberally borrowing from Professor Seavey,¹⁷⁵ rejected them all. Levelling pointed criticism at the injustice of the doctrine, it then expressly overruled prior Maryland decisions which had adopted it.¹⁷⁶ "If judgment in the second action is denied solely because the law considers an election to have taken place, a just claim has . . . been thwarted. . . . It could leave the creditor with but one possibly uncollectible judgment" ¹⁷⁷

If, as the minority of courts and virtually all commentators believe, the election doctrine presents such poor reasoning, why does it retain its vitality? One response certainly must look to the *Restatements*, which by their timidity continue to effectively codify established, albeit ill-conceived, law. Yet the real reason seems to lie deeper, entrenched in the very foundations of agency law itself. The reasoning supporting the imposition of both vicarious liability and the

without disclosing his principal, until the debt has been satisfied by one or the other." *Tew v. Wolfsohn*, 77 A.D. 454, 458, 79 N.Y.S. 286, 288-89 (1902), *aff'd on other grounds*, 174 N.Y. 272, 66 N.E. 934 (1903). *Contra Cherrington v. Burchell*, 147 A.D. 16, 131 N.Y.S. 631 (1911).

171. 225 N.Y. 410, 122 N.E. 238 (1919).

172. *See supra* note 127.

173. N.Y. CIV. PRAC. ACT § 112-B (1939) (current version at N.Y. CIV. PRAC. LAW § 3002 (McKinney 1974)). *See also* N.Y. CIV. PRAC. LAW § 3002 practice commentaries § C3002.21 (McKinney 1974). Contemporary cases now permit a plaintiff to recover judgment against both principal and agent as a matter of course. *See, e.g., Empire Livestock Mktg. Coop. v. Carney*, 279 A.D. 951, 110 N.Y.S.2d 823 (1952).

174. 290 Md. 687, 432 A.2d 453 (Ct. App. 1981).

175. Section 435 explanatory note, *supra* note 4.

176. *Garfinkel v. Schwartzman*, 253 Md. 710, 254 A.2d 667 (1969); *Hospelhorn v. Poe*, 174 Md. 242, 198 A. 582 (1938); *E.J. Codd Co. v. Parker*, 97 Md. 319, 55 A. 623 (1903).

177. *Grinder*, 290 Md. at —, 432 A.2d at 464.

liability of the undisclosed principal has little to do with traditional legal thought. Rather, these results came about as the law attempted to adapt itself to the commercial reality of surrounding society. Tort law, in rejecting the doctrine of election in the case of the vicarious principal, continued to cope with the problem by establishing a consistent line of logic in cases dealing with the business world. In contrast, contract law failed to adjust to the developing law of agency and retained its traditional analysis in requiring an election. This break with the more pragmatic approach in agency cases led to a doctrine which, although perhaps facially consistent with other cases arising in a noncommercial setting, makes little sense and yields little equity where the purpose of holding the principal liable is to provide two sources of recompense for the injured third party.

Rationally and doctrinally, courts adopt the election approach in error. In the best of all possible worlds, they would abandon their rule and reject the *Restatement*. Unfortunately, this has not occurred and there seems little hope that it will occur with any rapidity in the future. Accordingly, the courts need to adopt another method, within their present structure, to minimize the harsh results which election may produce.

VI. DISCOVERY OF NET WORTH

A. Before Judgment

Where a plaintiff must elect against which of two defendants he will take a judgment, he should have some access to information regarding the ability of each defendant to pay the award. Otherwise, the plaintiff forced to choose does so in the dark and frequently will select a defendant who totally lacks resources which can satisfy a judgment. There are two solutions which would avoid this problem: either reject election totally and let the plaintiff recover a joint judgment which in turn leads to a single satisfaction, or permit the plaintiff to determine prior to making the election which of the defendants has greater assets upon which he can levy. With a majority of American courts rejecting the former approach in suits against agents and their undis-

closed principals, the implementation of the latter may present a viable alternative.

Under both federal and state procedure, however, the discovery of the net worth of a defendant in most cases falls beyond the scope of discovery as traditionally viewed.¹⁷⁸ Although generally quite broad,¹⁷⁹ discovery still has as its outer boundaries those matters which pertain to the subject matter of the action.¹⁸⁰ In the typical case, the net worth of either party seldom has any bearing on issues which arise at trial.¹⁸¹ Accordingly, courts will prohibit discovery of net worth on the motion of a party for a protective order.¹⁸² Courts so consistently reject any attempt by plaintiffs to discover the ability of defendants to pay a judgment¹⁸³ that the drafters of the Federal Rules of Civil Procedure found it necessary to include a specific provision permitting limited disclosure of the contents of insurance policies.¹⁸⁴ The advisory committee for the Federal Rules reasoned that a court should properly except insurance policies from the general rule of nondisclosure "because insurance is an asset created

178. Under the Federal Rules of Civil Procedure, a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." FED. R. CIV. P. 26(b)(1).

179. *Horizons Titanium Corp. v. Norton Co.*, 290 F.2d 421, 425 (1st Cir. 1961). See generally 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2007 (1970).

180. "The term 'subject matter' has sometimes been relied upon to distinguish between substantive issues and those that deal with the mechanics of preparation and litigation." 4 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 26.56[1], at 26-117 (2d ed. 1983).

181. "Ordinarily, Rule 26 will not permit the discovery of facts concerning a defendant's financial status, or ability to satisfy a judgment, since such matters are not relevant, and cannot lead to the discovery of admissible evidence." *Ranney-Brown Distribs. v. E.T. Barwick Indus.*, 75 F.R.D. 3, 5 (S.D. Ohio 1977). See also *Bogosian v. Gulf Oil Corp.*, 337 F. Supp. 1228, 1230 (E.D. Pa. 1971) (denying discovery of plaintiff's net worth where defendant sought to determine plaintiff's ability to satisfy a potential judgment for costs).

182. See, e.g., *Doak v. Superior Court*, 257 Cal. App. 2d 825, 65 Cal. Rptr. 193 (1968); *Benoit v. International Harvester Co.*, 251 So. 2d 389 (La. App. 1971).

183. Typical of early cases refusing discovery of the limits of liability insurance policies is *Brooks v. Owens*, 97 So. 2d 693 (Fla. 1957). Florida has since passed a statute specifically requiring disclosure of policy limits. FLA. STAT. ANN. § 768.045(1)(c) (West 1983).

184. FED. R. CIV. P. 26(b)(2). See *Grise v. Crownover*, 57 F.R.D. 210 (E.D. Tenn. 1971); 8 C. WRIGHT & A. MILLER, *supra* note 179, at § 2010.

specifically to satisfy the claim."¹⁸⁵ In sum, where no substantive issue in a case deals with the net worth of a party, another party will find the path to discovery of that net worth blocked by an objection based on lack of relevance.

In certain instances, however, courts permit a party at least limited latitude to discover the net worth of another. Frequently a plaintiff seeking punitive damages may have this discovery. By their very nature, punitive damages should deter the defendant from continuing to pursue the action which formed the basis of the complaint.¹⁸⁶ Accordingly, they must form a warning to others in similar positions that courts will not tolerate such conduct¹⁸⁷ and so must bear some direct relation to the ability of the defendant to pay in order to serve their purpose.¹⁸⁸ Thus, since a jury quite properly must consider the net worth of a defendant in determining the amount of punitive damages to assess,¹⁸⁹ a plaintiff should have access to that information through discovery at an appropriate stage of the proceedings.¹⁹⁰

Courts also routinely permit discovery of the net worth of a party in divorce cases.¹⁹¹ Whether at the initial hearing¹⁹² or in later actions for modification due to changed cir-

185. Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 499 advisory committee note (1970).

186. See, e.g., *Mattiasovszky v. West Towns Bus Co.*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980); *Jones v. Fisher*, 42 Wis. 2d 209, 166 N.W.2d 175 (1969); RESTATEMENT (SECOND) OF TORTS § 908 (1979).

187. See, e.g., *Trahan v. Cook*, 288 Ala. 704, 710, 265 So. 2d 125, 130 (1972); Comment, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 522 (1957).

188. See *Southern Pac. Transp. Co. v. Lueck*, 111 Ariz. 560, 535 P.2d 599 (1975) (net assets of \$1.7 billion justified award of \$1.1 million in punitive damages).

189. See *Atlas Properties v. Didich*, 213 So. 2d 278 (Fla. Dist. Ct. App. 1968) (example of how a court may use net worth in its computation of punitive damages). See also RESTATEMENT (SECOND) OF TORTS § 908 comment e (1977).

190. *Breault v. Friedli*, 610 S.W.2d 134, 136 (Tenn. Ct. App. 1980). See also Annot., 27 A.L.R.3d 1375 (1969). "Thus, the net worth of the defendant is always a material issue when punitive damages are sought, and the plaintiff is generally entitled to discover such evidence and introduce it at trial." Note, *Pretrial Discovery of Net Worth in Punitive Damages Cases*, 54 S. CAL. L. REV. 1141 (1981).

191. Some states expressly permit this discovery by statute. See, e.g., N.Y. DOM. REL. LAW. § 250 (McKinney 1981). More typically, however, courts imply the right to discover. See, e.g., *Kocha v. Kocha*, 349 So. 2d 690 (Fla. Dist. Ct. App. 1977).

192. See, e.g., *Elkins v. Elkins*, 228 So. 2d 105 (Fla. Dist. Ct. App. 1969); *Schwartz v. Schwartz*, 59 A.D.2d 904, 399 N.Y.S.2d 139 (1977).

cumstances,¹⁹³ the net worth of a party bears directly on the amount of alimony or child support he or she must pay.¹⁹⁴ If the opposing party does not obtain this information in advance of trial, he or she cannot adequately present a case on the amount of the award.¹⁹⁵ Accordingly, the information has great relevance to issues at the hearing. On the other hand, courts refuse to permit discovery when the amount of an award of child support or alimony is not an issue,¹⁹⁶ thus reinforcing the conclusion that discovery of net worth in these cases will come only as a direct incidence of the relevance of the information at the eventual hearing.

The third typical case in which pretrial discovery of net worth comes into play is the class action, where a defendant challenges the adequacy of representation a particular plaintiff will provide for the class as a whole.¹⁹⁷ The court must certify the action as one properly conducted as a class action¹⁹⁸ and, in making this determination, must have available to it information regarding the ability of a plaintiff to prosecute the case through to its ultimate conclusion.¹⁹⁹ As a result, courts permit discovery of the net worth of the plaintiff for the limited purpose of determining whether to certify the class.²⁰⁰ However, courts have restricted the scope of such discovery to general questioning *in camera*²⁰¹ and have closely scrutinized plaintiffs' requests for protective or-

193. *Kocha v. Kocha*, 349 So. 2d 690 (Fla. Dist. Ct. App. 1977). At least one court, however, has required a *prima facie* showing of changed circumstances as a prerequisite to discovery in a modification proceeding. *Lepis v. Lepis*, 83 N.J. 139, ___, 416 A.2d 45, 54 (1980).

194. *Block v. Block*, 281 Ala. 214, 201 So. 2d 51 (1967); *O'Dell v. O'Dell*, 57 Ala. App. 185, 326 So. 2d 747 (1976).

195. "[W]ithout access to such reliable indicia of the supporting spouse's financial ability, the movant may be unable to prove that modification is warranted." *Lepis v. Lepis*, 83 N.J. 139, ___, 416 A.2d 45, 54 (1980).

196. A father sued for a declaratory judgment to determine whether he remained liable to pay weekly support for his son when he was at the same time paying college expenses. The court denied the mother the opportunity to inquire into the father's net worth. *Heiman v. Heiman*, 369 So. 2d 956 (Fla. Dist. Ct. App. 1978).

197. *FED. R. Civ. P.* 23(a)(4).

198. *Ralston v. Volkswagenwerk, A.G.*, 61 F.R.D. 427 (W.D. Mo. 1973); *FED. R. Civ. P.* 23(c)(1).

199. *Klein v. Henry S. Miller Residential Servs.*, 82 F.R.D. 6 (N.D. Tex. 1978).

200. *Rode v. Emery Air Freight*, 76 F.R.D. 229 (W.D. Pa. 1977); *Stern v. Carter*, 82 A.D.2d 321, 441 N.Y.S.2d 717 (1981).

201. *Stern v. Carter*, 82 A.D.2d at ___, 441 N.Y.S.2d at 730.

ders.²⁰² Of course, once the order certifying the class takes effect, such discovery becomes irrelevant and the defendant can no longer take advantage of it.

Other than in these three categories, courts permit pre-judgment discovery only on a showing of genuine relevance. Thus, where the president of a brokerage firm purportedly misapplied the funds of his investors, the court permitted discovery of his personal tax records and those of the firm.²⁰³ Along the same lines, discovery of the tax worth of defendants in a case involving a conspiracy in violation of antitrust statutes was allowed to proceed because the financial evidence could have led to admissible evidence.²⁰⁴ Another court exhibited a willingness to permit discovery of net worth in a case brought under the Truth in Lending Act.²⁰⁵ In all of these cases the element of willful malfeasance may have colored the court's judgment.

In Louisiana, where a defendant can plead inability to pay a judgment in mitigation of damages,²⁰⁶ evidence of his net worth has a direct bearing on the issues at trial. Accordingly, Louisiana permits discovery of net worth.²⁰⁷ However, should the defendant stipulate that he will not raise the defense of inability to pay, discovery of net worth becomes irrelevant and impermissible.²⁰⁸

Not only do courts require plaintiffs to toe the strict line of relevance before permitting discovery of net worth, they frequently place a protective web around the discovery when they do grant it.²⁰⁹ The entire concept of utilizing net worth in the proof of punitive damages has brought criticism from jurists²¹⁰ and commentators²¹¹ alike, and this renders prob-

202. *Klein v. Henry S. Miller Residential Servs.*, 82 F.R.D. 6, 9-10 (N.D. Tex. 1978).

203. *Hawes v. C.E. Cook & Co.*, 64 F.R.D. 22 (W.D. Mich. 1974). The court used not only the relevance analysis in permitting discovery, but also found the material was "reasonably calculated to lead to the discovery of admissible evidence." 64 F.R.D. at 28.

204. *Trans World Airlines v. Hughes*, 29 F.R.D. 523 (S.D.N.Y. 1961).

205. *Postow v. Oriental Bldg. Ass'n*, 455 F. Supp. 781, 792 (D.D.C. 1978).

206. *Loyacano v. Jurgens*, 50 La. Ann. 441, 23 So. 717 (1898).

207. *Guy v. Tonglet*, 379 So. 2d 744 (La. 1980).

208. *Id.* at 746-47.

209. See *supra* notes 181, 183, 193, 196, 201, 202 & 208.

210. *Rupert v. Sellers*, 48 A.D.2d 265, 368 N.Y.S.2d 904 (1975).

211. Note, *The Use of Evidence of Wealth in Assessing Punitive Damages in New*

able increased protective orders in prejudgment discovery in this area. Courts show themselves amenable to restricting discovery solely to opposing counsel,²¹² to bifurcating discovery by prohibiting any discovery relating to net worth until the jury has handed down a special verdict finding the right to punitive damages,²¹³ to requiring a prima facie showing that a jury should grant punitive damages before ordering discovery,²¹⁴ to permitting discovery but then holding it under seal until the plaintiffs demonstrate a factual basis for their claim²¹⁵ and to limiting the scope of material subject to discovery upon a showing of good cause.²¹⁶

Courts dislike discovery of financial worth.

It seems a rare instance indeed that the potential of disclosure for purposes unrelated to the lawsuit or to persons other than counsel and their representatives serves any purpose except to give a tactical edge to the party who has obtained discovery of the information by allowing that party the benefit of pressure in settlement negotiations by threat or implication of disclosure.²¹⁷

At the same time, courts acknowledge its necessity. Statements by a defendant of his net worth, even under oath, will not provide an acceptable substitute for full discovery.²¹⁸ By extrapolation, then, statements obtained from private investigators or from private financial rating services cannot substitute for the rigors of discovery. "The search for forgotten or hidden assets is of the essence of the discovery process."²¹⁹ Accordingly, courts balance this need for discovery before trial against negative elements inherent in the discovery and

York: *Rupert v. Sellers*, 44 ALB. L. REV. 422 (1980); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 528 (1957). But see Comment, *Punitive Damages and the Admissibility of Evidence of Wealth*, 29 ALA. L. REV. 564 (1978).

212. *Richards v. Superior Ct.*, 86 Cal. App. 3d 265, 272, 150 Cal. Rptr. 77, 81 (1978).

213. *Rupert v. Sellers*, 48 A.D.2d 265, 368 N.Y.S.2d 904 (1975). But see *Cobb v. Superior Ct.*, 99 Cal. App. 3d 543, 548, 160 Cal. Rptr. 561, 564 (1979).

214. *Gierman v. Toman*, 77 N.J. Super. 18, 185 A.2d 241 (1962); *Campen v. Stone*, 635 P.2d 1121 (Wyo. 1981).

215. *Breault v. Friedli*, 610 S.W.2d 134 (Tenn. Ct. App. 1980).

216. *Ernst & Ernst v. Reedus*, 260 So. 2d 258 (Fla. Dist. Ct. App. 1972).

217. *Richards v. Superior Ct.*, 86 Cal. App. 3d 265, 272, 150 Cal. Rptr. 77, 81 (1978).

218. *Tennant v. Charlton*, 377 So. 2d 1169 (Fla. 1979); *Lay v. Kremer*, 411 So. 2d 1347 (Fla. Dist. Ct. App. 1982).

219. *Donahue v. Hebert*, 355 So. 2d 1264, 1265 (Fla. Dist. Ct. App. 1978).

fashion proper protective orders while permitting disclosure of the information.²²⁰

B. After Judgment

In contrast to the strict rule prohibiting prejudgment discovery of net worth without a stringent showing of relevance, postjudgment discovery proceeds in virtually all cases. The Federal Rules of Civil Procedure, as well as many state rules, expressly permit a judgment creditor to discover the assets his debtor has available to satisfy his claim.²²¹ Stemming from the discovery annexed to the common-law creditor's bill²²² or, alternatively, from the later development of a supplemental proceeding in aid of execution,²²³ discovery at both federal and state levels permits broad latitude to the judgment creditor seeking assets

220. If plaintiffs were allowed unlimited discovery of defendants' financial resources in cases where there is no factual basis for an award of punitive damages, the personal and private financial affairs of defendants would be unnecessarily exposed and, in some cases, the threat of such exposure might be used by unscrupulous plaintiffs to coerce settlements from innocent defendants.

Tennant v. Charlton, 377 So. 2d 1169, 1170 (Fla. 1979).

221. FED. R. CIV. P. 69(a); ALA. R. CIV. P. 69; ALASKA R. CIV. P. 69; ARIZ. R. CIV. P. 69; ARK. STAT. ANN. § 30-901 (1979); CAL. CIV. P. CODE § 714 (Deering 1982); CONN. GEN. STAT. ANN. § 52-397 (West 1982); FLA. R. CIV. P. 1.560; IDAHO R. CIV. P. 69; ILL. ANN. STAT. ch. 110 § 73 (Smith-Hurd 1982); IND. R. TRIAL P. 69(E) & IND. CODE § 34-1-44-1 (Supp. 1982); IOWA CODE ANN. § 630.1 (West Supp. 1982); KAN. STAT. ANN. § 60-2419 (1976); KY. R. CIV. P. 69.03; LA. CODE CIV. PROC. ART. 2451 (1982); ME. REV. STAT. ANN. tit. 14, § 3122 (1964); MD. R.P. 628; MASS. R. CIV. P. 69; MICH. COMP. LAWS ANN. § 600.6104 (West Supp. 1982-1983); MINN. R. CIV. P. 69; MO. R. CIV. P. 76.27; MONT. CODE ANN. § 25-14-101 (1981); NEB. REV. STAT. § 25-1564 (1981); NEV. R. CIV. P. 69(a); N.J. CIV. PRAC. R. 4:59-1(e), 6:7-2(a); N.M. R. CIV. P. 69; N.Y. CIV. PRAC. LAW § 5223 (McKinney 1981); N.C. GEN. STAT. § 1-352 (1981); N.D. R. CIV. P. 69; OHIO R. CIV. P. 69; OKLA. STAT. ANN. tit. 12, § 842 (West 1982); OR. REV. STAT. §§ 23.710, 23.720 (1981); PA. R. CIV. P. 3117; R.I. R. CIV. P. 69; S.C. CODE ANN. § 15-39-310 (Law. Co-op. 1982); S.D. CODIFIED LAWS ANN. §§ 15-6-69, 15-20-1 (1982); TENN. R. CIV. P. 69; UTAH R. CIV. P. 69(k); VT. R. CIV. P. 69; VA. CODE § 8.01-506 (1982); WASH. REV. CODE ANN. § 6.32.010 (1982); W. VA. CODE ANN. § 38-5-1 (1982); WIS. STAT. § 816.03-.11 (1981-1982); WYO. R. CIV. P. 69.

222. "In addition to reaching assets not reached by the legal writs, the creditor's bill also provided a method for discovering hidden assets. The bill commonly provided a method for discovery of all the debtor's property, and the debtor and others might be examined to uncover assets." D. EPSTEIN & J. LANDERS, *DEBTORS AND CREDITORS: CASES AND MATERIALS* 90 (2d ed. 1982).

223. *Id.* at 96-97.

with which to satisfy his or her judgment.²²⁴ Federal and state courts follow essentially the same procedure in permitting discovery, although some states require the return of a writ of execution showing no property found by the sheriff²²⁵ and some only permit discovery in open court.²²⁶ In contrast, the federal practice allows discovery at any time and in any manner.²²⁷

Whatever minor differences may exist in time and manner of discovery, all courts agree that plaintiffs enjoy a broad scope of questioning once they have received a judgment, so long as the information elicited pertains to assets of the judgment debtor which the plaintiff can reach to satisfy the judgment.²²⁸ Third parties as well as the judgment debtor stand subject to deposition if they know any facts relating to possible resources of the debtor.²²⁹ Postjudgment discovery exists to afford access to the financial resources of the debtor, whether overt or concealed,²³⁰ and the intertwining of corporate and personal business affairs will not defeat the right to discover the personal assets of the debtor even if disclosure of assets not subject to levy will also emerge.²³¹ In sum, the judgment creditor has virtually no limit to an inquiry into

224. See 12 C. WRIGHT & A. MILLER, *supra* note 179, § 3014.

225. Evidently, the rule in these states derived from the creditor's bill. See, e.g., ARK. STAT. ANN. § 30-901 (1979).

226. These states may have taken their rules from the practice of supplemental proceedings. See, e.g., ALASKA R. CIV. P. 69(b); CAL. CIV. P. CODE § 714 (West 1982).

227. After a number of cases questioned whether only depositions could satisfy its requirements, see, e.g., *M. Lowenstein & Sons v. American Underwear Mfg. Co.*, 11 F.R.D. 172 (E.D. Pa. 1951), the rule was amended in 1970 to provide that the creditor could obtain discovery "in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held." FED. R. CIV. P. 69(a). As practice varies only in minor degree beyond these exceptions, this article will consider primarily federal examples and assume their application in state cases. But see *Conrad v. McMechen*, 338 So. 2d 1306 (Fla. Dist. Ct. App. 1976) (delineating a difference between proceedings under statutes and those under rules).

228. *Monticello Tobacco Co. v. American Tobacco Co.*, 12 F.R.D. 344 (S.D.N.Y. 1952), *aff'd* 197 F.2d 629 (2d Cir. 1952), *cert. denied*, 344 U.S. 875 (1952); *Caisson Corp. v. County West Bldg. Corp.*, 62 F.R.D. 331, 334 (E.D. Pa. 1974).

229. *Davis Acoustical Corp. v. Skulnik*, 131 N.J. Super. 87, 328 A.2d 633 (1974). Of course, they need divulge nothing about their own personal assets during this discovery. *Burak v. Scott*, 29 F. Supp. 775 (D.D.C. 1939).

230. *Ash v. Arnold*, 115 Ariz. 462, —, 565 P.2d 1323, 1324 (Ct. App. 1977).

231. *Caisson Corp. v. County West Bldg. Corp.*, 62 F.R.D. 331, 334 (E.D. Pa. 1974).

the debtor's assets other than relevance and undue harassment.²³² Courts regard this discovery as so necessary that claims of privilege which fall short of constitutional magnitude will not defeat it.²³³

Courts have believed that without the protection of the discovery process a judgment debtor could so readily conceal assets as to render the judgment a hollow victory.

Since the remedy against the property of the debtor is now almost entirely deprived of the auxiliary coercion, intended by the arrest and imprisonment of his person, the creditor's naked claim against the property ought to receive the most effective support, and every rule calculated to prevent the debtor from secreting or masking it to be sustained with fortitude and vigor.²³⁴

Thus, through the mechanism of broad discovery permitted after a judgment, courts provide against the danger of a debtor frustrating the judgment by secreting assets.²³⁵ In other words, the express purpose of postjudgment discovery is to assure that once a plaintiff recovers a judgment he will be able to satisfy it.

C. *Discovery Before Election of Defendants*

Plaintiffs sue the undisclosed principal as well as the contracting agent because courts have given them access to the party who instigated the contract as well as the party who effectuated it in order to maximize the possibility of recovery for the innocent plaintiffs.²³⁶ Courts permit plaintiffs discovery of the net worth of their defendants with great freedom after judgment in order to maximize the possibility of recovery on the judgment.²³⁷ Thus, while the same theory under-

232. "[T]he inquiry must be kept pertinent to the goal of discovering concealed assets of the judgment debtor and not be allowed to become a means of harassment of the debtor or third persons." *Id.* at 334.

233. *See, e.g.,* First Fed. Sav. & Loan Ass'n v. Fisher, 422 F. Supp. 1 (N.D. Ga. 1976), *aff'd*, 544 F.2d 902 (5th Cir. 1977).

234. 2 J. KENT, COMMENTARIES ON AMERICAN LAW 419 (DaCapo reprint 1971) (1st ed. 1827).

235. *See, e.g.,* United States v. McWhirter, 376 F.2d 102, 106 (5th Cir. 1967); Ranney-Brown Distribs. v. E.T. Barwick Indus., 75 F.R.D. 3, 5 (S.D. Ohio 1977); Davis Acoustical Corp. v. Skulnik, 131 N.J. Super. 87, 328 A.2d 633 (1974).

236. *See supra* text accompanying notes 30-47.

237. *See supra* text accompanying notes 234-35.

lies postjudgment discovery and suit against undisclosed principals, the plaintiff who discovers subsequent to making an election that he has picked the wrong defendant to pursue has gained his information far too late in the game to aid him.²³⁸

At the same time, traditional principles governing discovery before judgment would seem to bar discovery for the purpose of effectuating a meaningful election. Unless the discovery bears some relevance to an issue likely to arise at the trial of the action, courts will not permit it.²³⁹ Only by straining the concept of relevance can the issue of election of defendants fit the traditional rubric permitting discovery of net worth. Courts require an election because, as some state, liability in a contractual setting is several but not joint.²⁴⁰ Thus, the issue of which of the two defendants must suffer a judgment has no bearing on their liability at law. Similarly, the time of election does not come during the trial proper, but rather during pretrial proceedings or subsequent to the actual rendition of the verdict by the jury.

Courts, however, insist that a plaintiff have an opportunity to elect in a meaningful manner.²⁴¹ Thus, if they would view election not as an issue presented at trial but as an issue independently inherent in the case, discovery of the net worth of the two defendants would bear directly on the issue of the meaningful nature of the election. Not only must the plaintiff know he has a cause of action against the undisclosed principal before he must make his election, he must also know with some reasonable accuracy which of the defendants presents the better target to satisfy a judgment. Viewed in this light, the issue of net worth is of the highest relevance to the prosecution of the plaintiff's action.

Alternatively, courts could abandon their traditional rubric of relevance and acknowledge that since discovery must foster the goal of achieving justice in litigation,²⁴² to bar dis-

238. See, e.g., *Grinder v. Bryans Rd. Bldg. & Supp. Co.*, 290 Md. 687, ___, 432 A.2d 453, 464 (1981).

239. See *supra* text accompanying notes 179-81.

240. See *supra* text accompanying notes 91-93.

241. See *supra* note 129.

242. "Modern instruments of discovery . . . make a trial less a game of blind man's buff [sic] and more a fair contest with the basic issues and facts disclosed to the

covery in this instance would effectively arrive at an unjust result. Courts cannot extend the salutary assistance of postjudgment discovery only to block a plaintiff from ever reaching it by requiring him to abandon a legitimate claim against a defendant before even prosecuting it to judgment. One can hardly create a remedy while at the same time blocking all possible access to it.

Admittedly, discovery of net worth will not solve the problem in many instances.²⁴³ Clearly, discovery before judgment will matter little in those jurisdictions which hold that the very maintenance of a cause of action against one potential party constitutes an election.²⁴⁴ Similarly, where a defendant may move to require an election at the very filing of a joint action, the plaintiff will not have the opportunity to avail himself of the discovery process.²⁴⁵ One can hardly use a procedure unique to litigation if one is barred from that litigation *ab initio*.

Practical considerations will also render discovery of reduced value. Frequently, in the time between the discovery and the rendition of final judgment, the financial position of the elected defendant may change so drastically as to render him judgment proof. In these instances, all the discovery measures available to a plaintiff will prove of little value.

VII. CONCLUSION

Many courts permit a plaintiff to recover a judgment against a master and servant jointly, while prohibiting a judgment against an undisclosed principal and his agent. No sound doctrinal consideration supports mandatory election, yet courts stubbornly cling to the outmoded and unsuitable rule of the *Restatements*. Since the cause of action against the undisclosed principal came into being specifically to afford the widest possible range of options to the aggrieved third party, any rule of procedure which unjustifi-

fullest practicable extent." *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958).

243. *Cf. Grinder v. Bryans Rd. Bldg. & Supply Co.*, 290 Md. 687, —, 432 A.2d 453, 464 (1981).

244. *See supra* text accompanying notes 134-42.

245. *See, e.g., Dinkler Mgmt. Corp. v. Stein*, 115 Ga. App. 586, 155 S.E.2d 442 (1967).

ably curtails the remedies available in this cause of action has no basis in either theory or practice. The law can hardly give with one hand while blocking access to the gift with the other. Accordingly, those courts requiring election of defendants should reconsider their positions and reverse themselves. If the American Law Institute promulgates a third *Restatement of Agency*, it should reject the election doctrine in favor of the theoretically sound view permitting a plaintiff to obtain a joint judgment against both the undisclosed principal and the agent, while recovering but a single satisfaction.

Alternatively, states clinging to the election doctrine should permit plaintiffs to make meaningful choices. They should allow plaintiffs access to discovery of the net worth of their defendants before any election. To avoid any undue advantage to the plaintiff seeking to use this information improperly, courts can fashion protective restrictions on the discovery process.²⁴⁶ For example, courts may require defendants to comply with this discovery only upon their motions to have the plaintiff elect between them. Even then, the discovery may proceed *in camera*, and only the attorney for the plaintiff should have access to the information. Close monitoring of the type of discovery and restrictions on those items which the plaintiff may photocopy will also go far toward protecting the rights of the defendants. These protective measures should effectively balance the privacy of the defendants with the need of the plaintiff to make an informed election and, at the same time, keep as even as possible the competitive position of the litigants.

The doctrine of election contains the potential for a serious miscarriage of justice. Courts should reject it. Failing this, they should adopt measures to minimize its severity.

246. See *supra* text accompanying notes 209-16.

